SINGAPORE REPORTS.

THE FIRESTONE TIRE & RUBBER CO. (S.S.) LTD. v. SINGAPORE HARBOUR BOARD.

[Orig. Civ. Juris. (Brown, J.) December 9, 1949]
[Singapore — Suit No. 347 of 1948]

Public Authorities Protection Ordinance — Ports Ordinance S. 73 — Bailment — Goods stored in godowns of Singapore Harbour Board — Whether an action lies for short-delivery of goods so stored — Negligence of the Singapore Harbour Board.

The plaintiffs in this case claimed for damages for breach of contract of bailment. It was alleged that 3960 loose rubber tyres were received in the godowns of the defendants, the Singapore Harbour Board, but when the tyres were delivered to the plaintiffs, there were seventeen tyres short.

Held, (1) that on the facts of this case the defendants could not claim the protection of the Public Authorities Protection Ordinance as they were dealing with the plaintiffs as individuals in the course of an implied contract which was an incident in carrying on their business as warehousemen; (2) that on the facts the defendants had not discharged their burden of proving that the loss of the tyres was not due to any fault of theirs and therefore there must be judgment for the plaintiffs.

Cases referred to :—

(1) *Glyn v. East and West India Dock Co.* 6 Q.B.D. 475.
(2) *Bradford Corporation v. Myers* (1916) A.C. 242.
(3) *The Ydun* (1899) P. 236.
(4) *Milford Docks Co. v. Milford Haven Urban District Council* (1901) 65 J.P. 483.
(5) *Sharpington v. Fulham Guardians* (1904) 2 Ch. 449.
(6) *Palmer v. The Grand Junction Railway Co.* 4 M. & W. 749.
(7) *Carpue v. London and Brighton Railway* 5 Q.B. 747.
(8) *Phipps v. New Claridge's Hotel Ltd.* (1905) T.L.R. 49.
(9) *Coldman v. Hill* (1919) 1 K.B. 443.

CIVIL SUIT.

Dr. C. H. Withers-Payne (*J. L. Harris* with him) for the Plaintiffs.

C. H. Smith (*L. A. J. Smith* with him) for the Defendants.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Brown, J. : — The plaintiffs' claim is for damages for breach of contract of bailment. They say that they were the consignees of a cargo of 3960 loose rubber tyres which arrived in Singapore on the S.S. "Samokla" on the 4th of July 1946 from Bombay. They allege that the defendants received the full number of tyres into their godown No. 1, but delivered to the plaintiffs 17 tyres short. The defendants deny that they received the 17 missing tyres; and they say, alternatively, that if they did receive them they were lost as a result of theft from the godown despite reasonable precautions being taken against theft.

The defendants' Deputy Traffic Manager in his evidence gave three reasons for saying that the defendants did not receive the 17 missing tyres. His first reason was that they are not shewn in the defendants' records as having been received. His second reason was that thefts of cargo from ships before discharge were not unknown at that time. His third reason was that he knew of cases where cargo was stolen after landing on the wharf and before reaching the godown. With regard to his third reason, the defendants' pleading does not suggest that if the tyres were stolen they were stolen from any place other than the godown. And, according to the evidence, no witness saw any pilfering or looting of the cargo while it was being taken from the wharf to the godown. Seah Quee Bak was the tally clerk employed by the shipping agents. Standing on the wharf and tallying the cargo as it came from the sling, he was only 60 feet away from the godown or about the length of this Court. And the plaintiffs' representative, Mr. Dack, was present all the time. With regard to the suggestion that the tyres were stolen on the ship, the tally sheets (Ex. C) entered by Seah Quee Bak shew that there was no short-landing from the ship. And as for the point that the defendants' records do not shew that the 17 missing tyres were received, I do not think that much reliance can be placed on this because their tally sheets shew only 3923 tyres as having been received, although 3943 were in fact delivered to the plaintiffs. The fact is that the defendants' tally clerks were working under conditions of considerable difficulty at that time. Not all the godowns were in use, some having been damaged by enemy bombing. Those that were in use were congested. Labour was undisciplined, and it was not uncommon for the labourers to enter the godown through the wrong door and dump cargo in the wrong place, despite all the instructions, entreaties and efforts of the defendants' tally clerks. Compared with the difficulties under which the defendants' tally clerks were working at the door of the godown, the task of Seah Quee Bak on the wharf was simple. All he had to do was to count the tyres as they were taken from the sling and put on the hand-trucks, identifying the plaintiffs' mark in the case of each tyre. And when

he says that his tally sheets (Ex. C) are correct, I believe him, especially as Mr. Dack, the plaintiffs' representative, was also present. I find as a fact that the 17 tyres, which are the subject of this claim, were received by the defendants in their godown. But before leaving this part of the case a fact must be mentioned which will be of importance when I return to the evidence later in order to consider the question of negligence. In the cargo which was being discharged from the "Samokla", there was a large consignment of tyres for the military which was being discharged at the same time as the plaintiffs' consignment, and from the same hatch.

The first question of law which must be considered is whether there was a contract between the plaintiffs and the defendants. On behalf of the defendants a point was taken that owing to the form of endorsement on the back of the Bill of Lading (Ex. B) the plaintiffs had not proved that they were the consignees of the cargo. But I do not think it was disputed that the evidence shews that the defendants throughout treated the plaintiffs as the consignees, and that if there was an implied contract the plaintiffs as the owners of the goods were the contracting party. Therefore I propose to confine myself upon this question to the defendants' contention that the parties' relationship was statutory and not contractual.

I received the impression that in support of this contention the defendants mainly relied upon section 317 of the Merchant Shipping Ordinance. Whether that was a correct impression or not, I can only say that I cannot see what bearing section 317 has upon this case. That section makes provision for a case where the owner of the goods is not ready to take delivery, in consequence of which the ship-owner, if it were not for this provision, would be left with the goods on his hands. It provides that in such a case he may unship the goods and place them on a wharf or in a warehouse. And the succeeding sections make provision for the wharfinger's or warehouseman's lien and power of sale. But that is not this case. Here the plaintiffs were waiting to receive the goods. The Delivery Order (Ex. A 3) had been in the possession of the plaintiffs' representative for a fortnight. He was waiting for the goods on the wharf and was present throughout the time when they were being discharged. For the same reason I cannot see that the case of *Glyn v. East and West India Dock Co.*[1] has any bearing on this case. As Brett L.J. said at p. 484:—

> "The statute does not deal with the case of a delivery of goods to a person ready to take delivery after paying freight. It deals with the case of no such person being ready to take delivery."

Reference was also made to sections 46 and 62 of the Ports Ordinance. The former gives power to the defendants to fix and levy rates for their services, and the latter gives them a lien on the goods if the rates are not paid. But that does not impose upon the defendants a statutory liability apart from contract. By section 73 (c) the defendants have authority to carry on the business of warehousemen. And my view of the position is that when the defendants' servants take the goods from the wharf to the godown the defendants are impliedly contracting to act as bailees of the goods for a reward which they are statutorily empowered to fix. I have no doubt that the relationship is contractual, and if the defendants are liable in this case they are liable as bailees for reward for a breach of their contract of bailment.

But the defendants then say that if there was an implied contract it was subject to the exceptions contained in the Bill of Lading (Ex. B), which protect the shipper *inter alia* from "any loss by thefts or robberies by land or sea ... and any neglect or default whatsoever, or error in judgment of ... stevedores and others". And they refer to the Delivery Order (Ex. A 3) which states that it is "subject to the conditions of the Bill of Lading". But the Delivery Order is a document which is issued by the shipper's agent. It is an order addressed to the Singapore Harbour Board by the shipper's agent, instructing them to deliver the goods to the consignee, and setting out three conditions for the protection of his principal: (1) the steamer is not responsible for incorrect delivery according to mark; (2) no claims for short delivery or damage to goods will be entertained unless made within one month after the arrival of the vessel; and (3) the goods are subject to the conditions of the Bill of Lading. These are conditions for the protection of the shipper, and they are made by his agent. The defendants then referred to their bye-law No. 30, which provides that "the receipts given by the Board for cargo ... shall bear the following endorsement 'Received in apparent good order and condition (or as otherwise stated), not accountable for weight, measurement, contents, or value and subject to all the clauses governing the relative Bill of Lading' ". But that does not mean that in the place of the name of the shipper in the Bill of Lading we are to read the name of the Board, or that the Board in making their contract of bailment is taking over all the protective provisions which the shipper made for his protection when he made his contract of carriage. Bye-law No. 30 then proceeds specifically to set out the case when the Board will

not be responsible for safe custody, and that is a case where packages have arrived in a damaged condition and have been surveyed at the Board's Wharf. In all other cases the Board has the ordinary liability of a bailee for reward, subject to the partial limitations which are made in succeeding bye-laws.

I now pass to the important question of whether this action is barred by the Public Authorities Protection Ordinance. There can, in my view, be no doubt that the defendants are a public authority. The Chairman and every member of the Board is appointed by the Governor. All its officers are deemed to be public servants. There are no shareholders, and the undertaking is not run for personal profit. The Public Authorities Protection Ordinance has effect:—

> "Where any action.....is commenced against any person in respect of.....any alleged neglect or default in the execution of any Ordinance..... or of any public duty or authority."

The defendants say that in storing the plaintiffs' tyres they were acting in the execution of a public duty. They say that section 73 of the Ports Ordinance sets out their statutory duties, and that although the section opens with the words "The Board *may* —", the word "may" must be construed as "must". Section 73 is the only section contained in Part XII of the Ordinance, which has the heading "Works and Duties,"; and it sets out seventeen items of business which it says the Board may undertake under that heading. No doubt in certain statutes which authorize persons to do acts for the public good the word "may" has been held to have a compulsory force. But if one studies the language used in the seventeen items which section 73 sets out it is difficult to see how the section lends itself to such a construction. The items do not refer to specific acts which the Board is required to do. They enumerate in general terms various works and other kinds of business which the Board may undertake. By item (a) the Board may construct docks. How can the principle of compulsion be applied to that? What docks can the Board be compelled to construct? By item (p) they may be the insurers of goods in their custody. But it cannot be suggested that they are compelled to insure all goods which pass through their godowns. By item (c) they may "carry on the business of warehousemen". That is all. I can see nothing in those words which go so far as to create a duty whereby the defendants were bound to store the plaintiffs' tyres; and on behalf of the plaintiffs reference was made to the defendants own bye-law 39 as shewing that they were not so bound. I doubt if that bye-law can be said to have the full effect for which the plaintiffs contend, because I think it might equally well be said that its object was merely to protect the defendants in a case where they were physically unable to find storage space. But although I do not think that the tyres were stored in pursuance of any duty which could be enforced, they were stored in pursuance of an implied contract for which item (c) of section 73 furnishes the authority; and section 1(1) of the Public Authorities Protection Ordinance includes an act or default done in the execution of any public authority as well as in execution of any public duty. It seems to me that the short statement of the law as it appears in s. 612 of Hailsham Vol. 26 must be treated with reserve, because it appears to ignore the word 'authority' in the section. But the important word is the word "public". Did the defendants store the tyres in the execution of a *public* authority? Or did they store them in pursuance of a private contract, which item (c) gave them power to make or not as they pleased. As Lord Buckmaster said in the case of *Bradford Corporation v. Myers*[2]:

> "It is not because the act out of which the action arises is within their power that a public authority enjoys the benefit of the statute. It is because the act is one which is either in direct execution of a statute, or in the discharge of a public duty or in the exercise of a public authority."

In that case the defendant corporation was under a statutory duty to supply gas. They were also empowered to sell the coke produced in the manufacture of gas. The plaintiffs' premises were damaged through the negligence of the defendants' workmen when delivering a ton of coke in pursuance of that power. Lord Haldane said (at page 252):—

> "The language of section 1 (of the Public Authorities Protection Act) does not extend to an act which is done merely incidentally and in the sense that it is the direct result, not of the public duty or authority as such, but of some contract which it may be that such duty or authority put it into the power of a public body to make, but which it need not have made at all."

And Lord Shaw of Dunfermline (at page 264) contrasts the case of a person who boards a municipal tramway which the municipality is running in the execution of a public duty. Although by paying his fare he undoubtedly becomes a party to a contract, nevertheless "the boarding of the car, the payment of the fare, and the charging the corporation with the responsibility for safe carriage are all matters of a public right of carriage which he shares with all his fellow citizens". But where the foundation of the relations of the parties does not lie in anything but a private bargain, which it is open to either of them to enter into or decline, the matter is not one of public right or public duty but of a private and individual bargain.

Now it seems to me that if the authorities which have been cited in this case are read in the light of the contrasting illustrations of the man who boards a

municipal tramcar and the person who contracted to buy the Bradford Corporation's coke, the principle is clear. In the case of *The Ydun*[3] the vessel was exercising a public right of passage, and the Preston corporation was performing a public duty. If the vessel, with regard to the very matter which caused the damage, had refused to obey the orders of the harbour authorities her owners might have been summoned and fined. Equally if the corporation gave preference to one vessel over another in the performance of their public duty of allowing vessels to go up the river, the corporation would be to blame. Conversely, in *Milford Docks Co. v. Milford Haven Urban District Council*[4] the action was brought upon the contract to repair the highway and to recover the sum which the plaintiffs had expended, at the Council's request, on doing the work. It was a private contract between the plaintiff and the Council. The action was not founded on the public duty of the Council as a public authority to repair the highway. In *Sharpington v. Fulham Guardians*[5] the public authority had a public duty to provide a receiving house for poor children. In order to carry out their duty they employed a builder to erect the necessary building. Their contract with the builder was held to be a private contract and not one which they made in execution of their public duty to provide the receiving house for poor children. But I think that the two authorities which afford the best illustration of the principle are *Palmer v. The Grand Junction Railway Co.*[6] and *Carpue v. London and Brighton Railway*[7]. In those cases the relevant statutes empowered the railway companies to make the railways and also empowered them to become carriers themselves. In each case it was held, in an action for damages for injuries sustained in a railway accident, that the Company was sued in their capacity as common carriers and not in execution of the powers and authorities given by the statute. It seems to me that in the present case item (c) of section 73 of the Ports Ordinance gives the defendants power to carry on the business of warehousemen, just as in the two cases cited the railway companies were given power to carry on the business of common carriers; and that the alleged neglect or default was done in carrying on that business and not in the execution of a power given by the statute.

In the light of these authorities the test is to my mind clear: were the defendants dealing with the plaintiffs as members of the public in the course of an implied contract which was truly founded on their statutory powers or their public position? Or were they dealing with the plaintiffs as individuals in the course of an implied contract which was an incident in carrying on their business as warehousemen? In other words, was the plaintiffs' position analogous to the member of the public who boards a municipal tramcar, or was it analogous to that of the individual who bought the Bradford Corporation's coke? In my opinion the latter was the case. Leaving bye-law 39 out of account, I can find nothing in the Ports Ordinance which compelled the defendants to store the plaintiffs' tyres, and the authority which enabled them to do so is a general authority to "carry on the business of warehousemen". Equally, the plaintiffs were not bound to store the tyres in the defendants' godown. It is in evidence that sometimes goods are delivered to a consignee direct from the ship on to a lorry. There was no reason, except one of convenience, why the plaintiffs' representative should not have disregarded the Delivery Order (Ex. A 3), and asked the shipping agents to give him an order directed to the ship instead of the defendants, and transported his tyres direct from the ship to his own premises or to the godown of some warehouseman in the town. I have come to the conclusion that this action is not barred by the Public Authorities Protection Ordinance.

I now come to the final question in this case of whether, upon the facts, the defendants are liable for breach of their contract of bailment. Their duty as bailees was to use due care and diligence. They are not liable unless they were negligent. But the onus of proving that they were not negligent lies upon them, *Phipps v. New Claridge's Hotel Ltd.*[8]. I have already referred to the fact that a large consignment of tyres for the military authorities were being unloaded at the same time as the plaintiff's tyres, from the same ship, and from the same hatch. When the plaintiffs' representative discovered the loss of the 17 tyres he reported it to the defendants' clerk and suggested that they might have been taken in error by the military. This suggestion was strengthened by the fact that some of the military tyres, with the white Army stencil mark on them, were still left in the godown. Surely the reasonable thing would have been to contact the B.O.D. and enquire if any of the plaintiffs' tyres had been taken by the military in error? Mr. Smith, on behalf of the defendants contended that having told the plaintiffs about the loss the defendants' duty to contact the B.O.D. was at an end. But I cannot accept that. Their duty was to take every reasonable step in using due care and diligence to keep the tyres in safe custody. It seems to me that, in all the circumstances that was a reasonable step which

they could and should have taken, and which if it had been taken might well have resulted in the recovery of the missing tyres. I think this point is covered by the case of *Coldman v. Hill*[9]. The head-note to that case reads :—

> "An agister of cattle does not discharge himself of his duty as a bailee for reward by proving that they were stolen without his default, if by using reasonable diligence he could have recovered them.
>
> If, having failed to use such diligence, he is sued for loss of the cattle, he must prove, in order to discharge himself, that such diligence would have been unavailing; it is not for the bailor to prove that it would have retrieved the loss."

That case was an appeal from a Divisional Court, which had taken the view that "the burden of proof that the negligence caused the loss is on the plaintiff, and that as it is pure gueswork whether inquiries or search would have recovered the beasts or not, he fails to sustain the burden of proof he is under". This view was held to be erroneous by the Court of Appeal, and Bankes L.J. (at page 450) said the case was covered by the rule that the bailee must shew that the loss of the goods was not due to any fault of his own. In my view the defendants in this case have not done so. When their Deputy Traffic Manager was asked why he made no enquiries from the B.O.D. he replied that it was "because they had no more tyres than they should have had". But he agreed that their correct quantity might have been made up by the 17 missing Firestone tyres. And it is in evidence that after all the Firestone tyres had been removed some military tyres still remained in the defendants' godown. Allowance must be made for the difficulties under which the defendants were working at this time. But the fact is that a step was not taken which could have been taken without difficulty, and I am satisfied that upon the evidence the defendants have not discharged their burden of proving that the loss of the tyres was not due to any fault of theirs.

There must be judgment for the plaintiffs for $2053.10 with costs on Higher Scale.

Stay of execution for 14 days and if notice of appeal lodged stay to continue until the hearing of the appeal.

Judgment for the plaintiffs.

X. Y. v. REX.

[App. Crim. Juris. (Murray-Aynsley, C.J.) December 15, 1949]

[Singapore — Magistrate's Appeal No. 144 of 1949]

Penal Code S. 354 — Unsworn evidence of girl of eight years — No corroboration — Whether conviction on such unsworn evidence without corroboration can stand.

In this case the appellant appealed against a conviction under S. 354 of the Penal Code. The alleged offence was in respect of a young girl of eight years of age who was not sworn. Her evidence was not corroborated. In his grounds of judgment the learned Magistrate said "I was so convinced that accused went to the secluded quarry with the girl that the only possible defences to which I could reasonably have paid attention would be that accused saw an animal crawling up the girl's skirt, or that he smacked her because she misbehaved herself while out with him."

Held, (1) that in such a case the absence of corroboration is not by itself a fatal objection to the validity of the conviction, but the appellate Court will scrutinize the record very carefully, because it is always an extreme thing to convict anyone on unsworn evidence; (2) that in this case the learned Magistrate had in his judgment displayed a wrong attitude to the child witness and therefore the conviction must be quashed.

Case referred to :—

(1) *Rex v. Velayuthan* (1935) M.L.J. 277.

MAGISTRATE'S APPEAL.

D. K. Walters (*Wee Chong Jin* with him) for the Appellant.

A. H. Simpson (D. P. P.) for the Crown.

Murray-Aynsley, C. J. : — In this case the appellant appeals against a conviction under section 354 of the Penal Code. Here the alleged offence was committed in respect of a young girl of eight years of age who was not sworn. Her evidence was not corroborated. In England, where unsworn evidence is given by children there is a statutory requirement of corroboration. Therefore, in England, this conviction could not have stood. Here there is no such statutory requirement but it has been wisely laid down in the case of *Rex v. Velayuthan*[1] that as a matter of prudence the evidence of such children should be treated in the same way as that of an accomplice. This, I take it, is also the practice in the case of adult witnesses in rape and other cases of that kind. The Magistrate appears to have been fully aware of the absence of corroboration and he does not appear to have misdirected himself as to what was required in such a case. In such circumstances the absence of corroboration is not by itself a fatal objection to the validity of the conviction. In such a case, however, an appellate Court will scrutinize the record very carefully, because it is always an extreme thing to convict anyone on unsworn evidence.

The Magistrate was obviously favourably impressed by the evidence of the girl concerned. From reading the record there is no reason at all to suppose that he was wrong in so doing. He was also favourably impressed by the evidence of her parents. Here again there is no reason to suppose that he was wrong. Unfortunately counsel (who did not appear on the appeal) made an accusation that the parents